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Utah Supreme Court

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# In The Supreme Court of the State of Utah

STATE OF UTAH,

RICHARD B. FAULKNER,

## BRIEF OF

Appeal from a judgment of the  
Second District Court, Salt Lake City,  
Honorable John B. Williams,

JIMI MITSUNAGA

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731 East South Temple

Salt Lake City, Utah

*Attorney for Defendant-Appellant*

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# In The Supreme Court of the State of Utah

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STATE OF UTAH,

*Plaintiff-Respondent,*

vs.

RICHARD B. FAULKNER,

*Defendant-Appellant.*

} Case No.  
11539

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## BRIEF OF RESPONDENT

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### STATEMENT OF NATURE OF CASE

The appellant, Richard B. Faulkner, appeals from a conviction in the Second District Court, Weber County, State of Utah, of the crime of burglary in the third degree.

### DISPOSITION IN LOWER COURT

The appellant was charged by information with the crime of burglary in the third degree. The matter was heard on November 26, 1968, before the Honorable John F. Wahlquist, Judge, sitting in the Second District Court at Ogden, Utah, with a jury.

The appellant was found guilty. Sentence was imposed December 10, 1968, confining the appellant in the Utah State Prison for a term as provided by law of not less than six months and not more than three years.

## RELIEF SOUGHT ON APPEAL

The respondents prays that the judgment of the trial Court be affirmed.

## STATEMENT OF FACTS

The respondent, State of Utah, submits the following statement of facts as being more in keeping with the rule that evidence will be reviewed on appeal in a light most favorable to the trial court's determination.

At approximately 1:00 p.m. on the afternoon of July 31, 1968, John C. Wood, one of the State's witnesses, was proceeding up the steps to the second floor of the Kiesel Building in Ogden, Utah, when he heard a buzzer sound coming from the lunchroom (T. 25 & 26). He started toward the lunchroom when he observed two men coming out of the lunchroom (T. 28). They passed by him and started down the stairs. Mr. Wood identified defendant Faulkner as one of the men coming from the lunchroom (T. 30).

Earl Lindquist, a State's witness, also testified that at approximately 1:00 on July 31, 1968, he heard the sound of the alarm buzzer which he had installed in the coke machine in the lunchroom (T. 36). The

alarm was set to go off when the door was opened. The door could only be opened by a key (T. 38). He asked his helper to hold the elevator while he went up the stairs to investigate. As he proceeded up the stairs, he met two men coming down the stairs. He asked them to wait until he could check his machine. They pushed by him and continued down the stairs at a fast walk. He asked three engineers to follow them until he was able to get a policeman (T. 40). He observed that one of the men was carrying a bank bag (T. 41). The bank bag was picked up later and the contents included a number of keys, one of which was found to open the pop machine in the lunchroom (T. 68). There was no money taken from the pop machine (T. 69).

The appellant testified that he opened the machine with the intent of robbing it (T. 75 & 76). He also admitted that the State's witnesses had testified as to happenings and sequences of events which occurred after he left the lunchroom (T. 76). His testimony was that the intent to commit larceny was not formed until he was already in the lunchroom (T. 75), that he had come to the building seeking to change his parole from Salt Lake City to Ogden (T. 73), and that he entered the lunchroom only because his companion, Mr. Jooston, had called to him (T. 74). He then entered the lunchroom where the coke machine was located, whereupon the crime for which the defendant-appellant was charged and convicted was committed.

## ARGUMENT

## POINT I

THE TRIAL COURT PROPERLY HEARD THE MOTION TO SEVER, AND IN ITS DISCRETION DENIED SUCH MOTION. SUCH DENIAL WAS NOT ERRONEOUS, AND EVEN IF IT WERE, IT DID NOT AFFECT THE SUBSTANTIAL RIGHTS OF THE DEFENDANT, MR. FAULKNER.

Utah Code Ann. § 77-31-6 (1953) provides:

“When two or more defendants are jointly charged with any offense, whether felony or misdemeanor, they shall be tried jointly, unless the court in its discretion on the motion of the prosecuting attorney or any defendant orders separate trials.”

A motion to sever was presented and argued by counsel for the defendant-appellant. The trial court, pursuant to its discretionary authority, denied the motion. The Utah Supreme Court held in *State v. Miller*, 111 Utah 255, 177 P.2d 727 (1947) that:

“Since the appellant could not demand a severance as a matter of rights it must appear that the court had before it the *facts* which would indicate that the appellant would be unduly prejudiced by a joint trial before it could be said that the trial court had abused its discretion.” (Emphasis added.) 111 Utah at 258.

While the record shows that counsel for the appellant made a motion for separate trials, it also



shows that counsel did not set forth facts, either by affidavit or oral argument, which established prejudice against the appellant. Thus, the trial court did not abuse its discretion in denying appellant's motion to sever.

The Utah Supreme Court also held in *State v. Rivenburgh*, 11 U.2d 95, 355 P.2d 689 (1960), that the trial court had not abused its discretion in denying a motion to sever even though the defense of the defendants were different. The fact still remained, they participated in a joint unlawful act, their defenses were not inconsistent or antagonistic to each other and there was no prejudicial fact establishing a need to sever the defendants for trial. 11 U.2d at 108-110. In the instant case, as in *Rivenburgh*, there is no allegation of inconsistent or antagonistic defenses as between the defendants, nor is there any other factual allegation establishing a need for severance at trial. The motion merely alleges that the abundance of evidence against one defendant was greater than against the other. This standing alone cannot be deemed sufficiently substantial to rule that the trial court erred in denying the appellant's motion to sever.

Even if the denial of the motion to sever were error, it did not prejudice the rights of the appellant. The appellant admitted during the trial court proceedings that he was at the scene of the crime and that he participated in the unlawful act charged against him (T. 75-76). To gain a reversal on appeal, the appellant must show error that is so prejudicial

that there is at least a fair likelihood that the result would have been different had the error not been committed. *Startin v. Madsen*, 120 Utah 631, 636, 237 P.2d 834, 836 (1951); *Gordon v. Provo City*, 15 U.2d 287, 290, 391 P.2d 430, 433 (1964); *State v. Valdez*, 19 U.2d 426, 429, 432 P.2d 53, 55, (1967); see also Utah Code Ann. § 77-42-1 (1953). In view of the appellant's testimony cited above, he has clearly failed to show that the error he now alleges would in all likelihood have caused a different result had the alleged error not have been committed.

A. THE ADMISSION OF TESTIMONY OF THE STATE'S WITNESS AS TO WHAT ONE DEFENDANT, MR. JOOSTON, SAID, WAS NOT PREJUDICIAL ERROR AGAINST THE OTHER DEFENDANT, MR. FAULKNER, AND EVEN IF IT WERE ERRONEOUS, IT DID NOT AFFECT THE SUBSTANTIAL RIGHTS OF THE APPELLANT, MR. FAULKNER.

The appellant is alleging that the admission of the testimony by State's witness Earl Lindquist was hearsay and prejudicial against defendant, Mr. Faulkner. Co-defendant Mr. Jooston, admitted to being on the stairway with Mr. Lindquist. The defense counsel objected on the basis that the testimony was hearsay as to defendant Faulkner. The judge then said he would receive the testimony only as to the person who speaks and not to the other; that the other man's case (Mr. Faulkner) would be judged as though this were not a part of the evidence (T. 46).

This admission of evidence was not prejudicial, nor was it hearsay, because the testimony did not

even mention Mr. Faulkner. The Utah Code Ann. § 77-44-6 (1953), is cited as support for appellant's position, but this statute speaks only in terms of one defendant testifying for or against another defendant. Such is not the circumstance in the instant case.

## POINT II

THE INFORMATION ADEQUATELY DEFINED AND GAVE NOTICE OF THE CRIME CHARGED, AND NO ERROR OCCURRED WHEN THE COURT CLARIFIED THE INFORMATION IN ITS INSTRUCTIONS TO THE JURY.

The information charged the defendants with "Burglary in the third degree committed as follows, to-wit: that said defendant broke and entered the Kiesel Building, in the day time with intent to commit larceny therein."

The Utah Code Ann. § 76-9-5 (1953) defines third degree burglary as follows:

"Every person who, in the *daytime* enters any dwelling house, *room*, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, or any tent, vessel water craft, railroad car, automobile, automobile trailer, *areo-*plane or aircraft, with intent to steal or to commit any felony whatever therein, is guilty of burglary in the third degree." (Emphasis added.)

The defendant alleges surprise when the trial court in instruction six instructed the jury that a person entering the lunchroom with intent to commit larceny is third degree burglary. The defendant alleges that said instruction defines a crime different

than that defined in the information charging the defendant with breaking and entering the Kiesel Building in the daytime with intent to commit larceny **therein** (Emphasis added). The definition of third degree burglary includes both the building and any room within the building which was closed to the defendant. The Kiesel Building was open to the public during the daytime on July 31, 1968, the day of the crime. On the other hand, the lunchroom, which was located on the second floor of said building, was closed to the public and the defendant. The lunchroom was the only area entered as evidence which could possibly support a conviction of third degree burglary. The thrust of the State's case centered around the lunchroom. Clearly the defendant was appraised of the crime for which he was charged from the very beginning of the proceedings.

The Utah Code Ann. § 77-21-8(i)(b) (1953) states that the information is valid and sufficient if it charges the offense for which the defendant is being prosecuted in sufficient terms to give the court and the defendant notice of what offense is intended to be charged. Moreover, Utah Code Ann. § 77-21-43(2) (1953) states that:

“No variance between those allegations of an information, indictment or bill of particulars which state the particulars of the offense whether amended or not, and the evidence offered in support thereof shall be ground for the acquittal of the defendant. The court may *at any time* cause the information, indictment or

bill of particulars to be amended in respect to any such variance, to conform to the evidence.  
(Emphasis added.)

In light of the above statute, clearly the trial court acted properly in allowing instruction six which in effect amended the information causing it to conform to the evidence; i.e., defining the area entered as the Kiesel Building lunchroom rather than just the Kiesel Building.

In *State v. Colston*, 16 U.2d 89, 91, 396 P.2d 405, 407, (1964), the Utah Supreme Court held that a discrepancy in the information would not be fatally defective where language fully appraised the defendant of the precise charge against him by detailing the facts constituting the offense. Such is the situation in the instant case.

The defendant also challenges the last sentence of instruction six, which is as follows:

“By an intent to commit burglary the court means a person entered an area closed to him with an intent to steal . . . However, it would be burglary if the defendant enters a room with an intent to look and see if there is something that can be stolen.”

This sentence was merely an attempt by the court to explain to the jury in layman's terms that the would-be thief need not have a specific item in mind to steal. Rather, he need only have an intent to steal. *People v. Ganon*, 130 Cal.App.2d 75, 278 P.2d 475 (1955); *State v. Pearre*, 237 Md. 622, 206 A.2d 249 (1965).

Moreover, the jury is presumed to have considered the instruction as a whole, *Cope v. Damson*, 30 Cal.2d 193, 180 P.2d 873 (1947); *Blaine v. Byers*, 91 Idaho 665, 429 P.2d 397 (1967). The portion of instruction six which defendant objects to would be of no material consequence when all instructions are considered as a whole. In addition, reasonable minds, based on the overwhelming evidence against the defendant, could only have arrived at the same verdict, to-wit: guilty.

### POINT III

THE TESTIMONY OF THE DEFENDANT AND THE CIRCUMSANTIAL EVIDENCE OFFERED BY THE STATE WERE SUFFICIENT FOR A JURY TO FIND BEYOND A REASONABLE DOUBT A VERDICT OF GUILTY AGAINST THE ACCUSED.

In a criminal case where intent is to be determined, the State is entitled to use circumstantial evidence as an inference of intent. *People v. Franklin*, 153 Cal.App.2d 795, 314 P.2d 983 (1957). In the instant case, the State had to show that the defendant entered the lunchroom intending to commit larceny. Intent, at time of entry to commit a felony, as a requisite element of burglary, is rarely susceptible of direct proof, and must usually be inferred from all facts and circumstances disclosed by the evidence. *People v. Henderson*, 138 Cal.App.2d 505, 292 P.2d 267 (1956). When did the intent to commit burglary form, two steps outside the lunchroom door, or two steps inside the lunchroom itself? A jury capably observed and heard testimony of the defendant and consid-



ered the other evidence before it. That jury was convinced beyond a reasonable doubt that the defendant had the requisite intent and was thus guilty as charged.

## CONCLUSION

The facts in the instant case amply demonstrate that the trial court acted properly in finding the appellant guilty of the crime charged. The legal claims of error on which the appellant relies for reversal are without merit. The motion to sever was properly heard and denied and appellant has shown no prejudicial error therefrom. The mere claim of prejudice is not sufficient, it must be shown. The information was adequate and gave notice to the appellant of the substantive elements of the charge. The instructions given by the court were consistent as to intent of the defendant. The circumstantial evidence and the testimony of the defendant were sufficient to justify a reasonable inference that the requisite intent for third degree burglary existed, thus satisfying the elements of the crime. We therefore pray that this Court affirm the conviction of the appellant.

Respectfully submitted

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